



WINDS FROM JAPAN

The Licensing Executives Society Japan

IP HIGH COURT CASE: COPYRIGHT FEES FOR PERFORMANCE AT MUSIC LESSONS

By Yoko Natsume *

On March 18, 2021, the Intellectual Property High Court (IP High Court) partially modified a ruling made by the Tokyo District Court, which had dismissed all claims in a case filed by a group of private music schools, teachers and organizations in the previous year on February 28, 2020. In the case, the plaintiffs demanded that the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC) confirm that the defendant has no claim against the plaintiffs for the use of music managed by the defendant in the plaintiffs' music schools.

JASRAC established in 1939 is the biggest management organization for administering music copyright in Japan; and until 2001 was the sole copyright management organization in Japan. JASRAC controls a large share of the market and has served to collect copyright fees for the use of creative works based on consignment contracts with creators. JASRAC also liaises with copyright licensing organizations abroad, and seeks through reciprocal arrangements with such organizations protection of music copyright.

Back in 2017, JASRAC announced their intention to collect copyright fees from music schools. The right of performance is one of several rights granted to authors of creative works under the Japanese Copyright Law. Article 22 of the law provides that "[t]he author shall have the exclusive right to perform his work publicly ("publicly" means for the purpose of causing a

work to be seen or heard directly by the public; the same shall apply hereinafter)". JASRAC contends that demonstrative performance of songs by teachers and students in music lessons should be interpreted as constituting "public performance" under the provisions of Article 22, and copyright fees thus apply. Private music schools and private teachers in Japan play an important role in music education for children. From this viewpoint, collection of fees from those who teach music to children, i.e., nurturing musicians for the next era, is not a practice that is deemed acceptable by a large number of people in Japan, and consequently has generated considerable controversy.

In the first decision last year, the Tokyo District Court uniformly ruled that the performance of music and the reproduction of sound recordings by teachers and students are acts that require permission from the copyright holder as performances of copyrighted works by the operator of the music school, regardless of the size of the school or the content of the lessons. The IP High Court, however, partially modified this decision and ruled that JASRAC does not have the right to demand royalties from music schools where music is performed by students in a music school that has less than 10 students, where reproduction of sound recordings does not take place, and where performances by students in private schools take place during one-on-one lessons without the reproduction of sound recordings.

In handing down the ruling, the presiding judge at the IP High Court stated that in the case of a performance by a student, “it can be said that music schools have made certain preparatory acts and prepared the environment for music to be played and a method of the performance. However, it is difficult to regard the playing of music by the student as a performance made by the music schools in view of the nature of the performance as an act for receiving instructions.” Further it was stated that “it is reasonable to understand that the student's performance is intended to be heard by the teacher in order to receive lessons and performance techniques based on the course contract. Therefore, it is clear that the student who plays the music is not playing for the purpose of ‘having other students hear it’, nor is it for the purpose of ‘having the student hear it.’ ” Thus, the IP High Court concluded that performance by students in a music school that has less than 10 students (including one-to-one private lessons) does not constitute performance of a creator's work “publicly” as stipulated in Article 22 of the Japanese Copyright law.

This ruling is in contrast to that made in a case referred to as the “Club Cat's Eye,” dating back to March 15, 1988, and which is considered to have set a precedent on this issue. In this case, the court ruled that for singing in a karaoke snack bar, a karaoke machine, and a karaoke tape recording of songs were installed, and the operator operated the karaoke machine, handed the customer a list of songs and a microphone, and recommended songs to be sung, and that the owner of the karaoke snack bar was the user of the musical works in question, including a case where the customer, not the owner, performed the act of singing.

Referring to this precedent, the IP High Court explained that “in the case of singing by customers in a karaoke shop, from the viewpoint

of the essence of the act of karaoke singing, singing in a karaoke store itself would not be possible without the provision of karaoke equipment, the setting up of the karaoke room and the installation of karaoke equipment by the shop, and therefore, ‘the nature of this case is very different’ from the playing by the student in music schools.” The Court further noted that “there is no evidence sufficient to admit that the use of the musical works for the students' performances in the lessons is included in the course fee paid under a contract, and it is difficult to say that the music school operators are directly profiting from the students' performance of musical works.”

The plaintiffs categorized performances into partial performances and full performances of a single piece, and recordings into commercial CDs and minus-one sound sources. They also emphasized some differences such as whether there are 10 or more students in a class, whether it is a one-teacher-to-one-student lesson, whether the classroom is set up by the plaintiffs or lessons are held at the students' homes, etc. Because the manner of performance differs from one plaintiff to another and from one lesson to another, it was necessary for the plaintiffs to distinguish the object of establishing ground for non-existence of the right to demand royalties dependent on each manner of “performance” rather than establishing non-existence of the right to demand royalties within the framework of claims constructed by JASRAC. The plaintiffs have gained at least partial success by adopting this strategy.

The plaintiffs and the defendant have filed appeals at the Supreme Court against the ruling, and further argumentation and rulings will be closely watched.

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\* *Editor/Patent Attorney, Ohchi International IP*

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# LES Japan Annual Conference 2021

## ~Hybrid Event~

**By Yasuo Fujii, Ph.D.\***

The LES Japan Annual Conference 2021 was held on July 9<sup>th</sup> and 10<sup>th</sup>, 2021 as a hybrid event that provided the members with flexible participation in person or online. The conference had 21 participants physically attending in a venue in Tokyo and 87 participants virtually attending online using a Zoom video conference system.

The Conference started with an opening ceremony. Firstly Mr. Mitsuo Kariya, the Organizing Committee Chair of the LES Japan Annual Conference 2021, gave his opening remarks. Mr. Kariya introduced the conference theme “Opening the Door to New Co-creation”, which expresses the importance of creating new value through dialogue by people in various positions even under the difficult circumstances, such as the ongoing pandemic.



Opening remark by Mr. Kariya

Next, Mr. Hiroki Saito, President of LES Japan, gave his opening speech from the physical venue. Mr. Saito expressed his expectation that the new co-creations would reliably be achieved using the experience gained under the pandemic.



Opening speech by Mr. Saito

Further, we had a welcome speech by Mr. John Paul, President of LES International, who gave his remarks online. Mr. Paul reminisced about his pleasant memories in Japan during the 2019 LES International Annual Conference in Yokohama. Mr. Paul also called on us to work together by communicating well and sharing our ideas.

After the opening ceremony, the two keynote lectures were given. The first keynote lecture was given by Dr. Akira Yoshino, 2019 Nobel Laureate in Chemistry, and Honorary Fellow of Asahi Kasei Corp. Dr. Yoshino introduced the history of the development of lithium-ion batteries, including his own experience. Dr. Yoshino mentioned the importance of patents for researchers in industry since the patents would be evidence that they are the first successful persons for a particular invention. Dr. Yoshino provided the participants with various thought-provoking stories.



Dr. Akira Yoshino  
(Source of photo: Asahi Kasei Corp.)

The second keynote lecture was given by Dr. Teruhisa Ueda, President and Chief Executive Officer of SHIMADZU CORPORATION. Dr. Ueda introduced the history of SHIMADZU CORPORATION and suggested that one of the reasons why the company has uniquely developed was due to inheriting the philosophy of its founder.



Dr. Teruhisa Ueda  
(Source of photo:  
SHIMADZU CORPORATION)

Subsequently, as the final event on the first day of the conference, the social gathering was held using Breakout Rooms on Zoom to provide 13 virtual rooms, each of which had its own theme of interest. The themes were Golf, Karaoke, Wine, Travel, Railroads, Sports/Exercise/Health, Outdoors/Climbing/Camp, Cooking, History/Castle/Buddha Statues, Tax Saving/Investing, Music, Home Garden/Pottery Art, and Remote-working. The participants were allowed to freely visit two or more rooms to enjoy intimate conversations sharing common interests.

On the second day, the conference was held online only. The conference started with workshops using Breakout Rooms on Zoom to provide 5 rooms given by 5 working groups of LES Japan: Branding WG, US issues WG, Healthcare WG, Industry-Academia issues WG and Competition Law WG.

Subsequently, a panel discussion was held with the theme “New Business Creation and Intellectual Property” by the moderator: Mr. Makoto Ogino, the Immediate Past President of LES Japan, and panelists: Mr. Shoei Imai (FUJIFILM Holdings Corporation), Mr. Takaaki Nagura (ROHM Co., Ltd.) and Mr. Hitoshi Nohno (OMRON Corporation). Firstly the panelists

introduced the ongoing measures in their companies for developing their business. Then they discussed various aspects regarding the intellectual property department in their companies such as the changes in the role of the IP department, the changes in the human resources in the IP department, and the relationship between trends in the business development and the IP department.

At the end of the Conference, Ms. Tomomi Fujita, the Organizing Committee Chair of the LES Japan Annual Conference 2022, announced that the LES Japan 43rd Annual Conference will be held on July 8<sup>th</sup> and 9<sup>th</sup>, 2022 at the Convention Hall Oumi annexed to the Lake Biwa Otsu Prince Hotel in Otsu city, Shiga prefecture.



Venue beside Biwa Lake

The LES Japan Annual Conference in Otsu city was initially planned in 2019, but has been postponed twice so far due to the pandemic. In addition, please be informed that **LES Japan will celebrate its 50th anniversary in 2022!** We sincerely hope to see you in person in Otsu city next year!

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* *Editor / Patent Attorney, Haruka Patent & Trademark*

IP News from Japan

By Shoichi Okuyama, Ph.D.*

Huge University Endowment Fund to Begin Next Year

In March 2022, Japan plans to launch a US\$91 billion (JPY 10 trillion) University Endowment Fund to reverse the downtrend in the nation's output of cutting-edge academic research. The operating cost subsidy, which was JPY 1.24 trillion in 2004, decreased to JPY 1.08 trillion in 2021. Japan ranked fourth in the world in 1996-98 with the top 10% of papers with the highest number of citations, but fell to 11th place in 2016-18. The University of Tokyo (36th) and Kyoto University (54th) are the only Japanese universities in the top 200 in the ranking compiled by a British magazine in 2020. The top Asian player was Tsinghua University (20th) in China. The Fund should also promote the establishment of U.S.-style endowment funds as a key component of Japanese university finances.

The Cabinet Office's Bureau of Science, Technology and Innovation is taking the lead. Seed money of JPY 0.5 trillion will come from the government budget, with additional funding of JPY 4 trillion from a governmental funding program, the Fiscal Investment and Loan Program. Over several years, the new Fund is initially expected to grow to JPY 10 trillion. The Fund will be managed by a semi-governmental organization, the Japan Science and Technology Agency (JST), under the jurisdiction of the Ministry of Education, Culture, Sports, Science and Technology (MEXT). Investments will be made in domestic and foreign stocks and bonds, and investment profits will be used to support research and development and young researchers. Mr. Masakazu KIDA, who sat on the board of the biggest agricultural bank in Japan, has joined the JST to manage the Fund.

University Endowments (US\$)	
Harvard U.	41 billion
Yale U.	30 billion
Cambridge U.	9.1 billion
Keio U. (private)	0.66 billion
Waseda U. (private)	0.27 billion
U. of Tokyo (national)	0.14 billion

Source: MEXT

The Fund's asset composition will be 65% domestic and foreign listed stocks and 35% bonds, and it plans to devote expected 3% investment returns (around US\$ 2.70 billion) to research support each year.

Nintendo Marks Another Win in Litigation Battle

On August 4, 2021, Nintendo Co., Ltd., and Colopl, Inc. published press and IR releases on the outstanding patent infringement battle between the two companies. Colopl said that it would pay US\$ 30 million (JPY 3.3 billion) to Nintendo and Nintendo would withdraw the lawsuit.

After more than a year of negotiations, Nintendo filed a patent infringement suit on December 22, 2017 at the Tokyo District Court (case No. 2017(wa) 43185) against Colopl, a relatively new player in the computer game market. Nintendo cited six patents against Colopl's smartphone game platform called "Shironeko (white cat) Project." At first, Nintendo demanded JPY 4.4 billion in damages and issuing of injunctions. At the time, Colopl had annual sales of JPY 14.9 billion. Colopl was apparently using delaying tactics. In February 2021, Nintendo increased the demand for damages to JPY 4.95 billion, and in April 2021, further increased the demand to JPY 9.67 billion. The stock price of Colopl subsequently plummeted. Perhaps this pushed Colopl, which had reportedly been denying infringement even at the beginning of this year, into settling.

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\* Editor / Patent Attorney, Okuyama & Sasajima

## Editors' Note

This issue includes articles, "IP HIGH COURT CASE: COPYRIGHT FEES FOR PERFORMANCE AT MUSIC LESSONS" by Ms. Yoko Natsume, "LES Japan Annual Conference 2021 ~Hybrid Event~" by Mr. Yasuo Fujii, and "IP News from Japan" by Mr. Shoichi Okuyama.

Thank you for supporting "*WINDS from Japan*." This newsletter will continue to provide you with useful information on activities at LES Japan and up-to-date information on IP and licensing activities in Japan.

If you would like to refer to any back issues of our newsletters, you can access them via the following URL:

<https://www.lesj.org/en/winds/new.php>

(YF)

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